No. 02-682

Supreme Court, U.S.
FILED
DEC 13 2002
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IN THE

Supreme Court of the United States

VERIZON COMMUNICATIONS INC.,

Petitioner,

v.

LAW OFFICES OF CURTIS V. TRINKO, LLP,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether under the standards applicable to a motion to dismiss, the Second Circuit correctly concluded that allegations of predatory actions by a local telephone monopolist regulated by the market opening provisions of the Telecommunications Act of 1996 suffice to state a claim under Section 2 of the Sherman Act?

2. Did the Second Circuit correctly conclude that a customer of a competitive local exchange carrier has standing under the antitrust laws and the Communications Act to challenge an incumbent local exchange carrier's anti-competitive discrimination against the competitive carrier that resulted in distinct and unique injuries to the customer?

RULE 29.6 STATEMENT

Respondent is a limited-liability partnership organized under the laws of the State of New York. It has no parent corporation, and no publicly-held firm owns a 10% or more interest in it.

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Law Offices of Curtis V. Trinko requests that this Court deny the Petition for a Writ of Certiorari ("Pet.") filed by Verizon Communications Inc. to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

COUNTER-STATEMENT OF THE CASE

The telecommunications industry, which continues to move from a model based on monopoly to one based on competition, has long been subject to antitrust oversight. During the 1970s and 1980s in particular, both the Justice Department and private parties used the antitrust laws to challenge AT&T's practices related to its control of the local network to exclude rivals, particularly in the long distance and equipment manufacturing markets. *See, e.g., MCI Communications Corp. v. AT&T Co.*, 708 F.2d 1081 (7th Cir. 1982) (assigning liability based on AT&T exclusionary practices as to long distance competitors), *cert. denied*, 464 U.S. 891 (1983); *Litton Systems, Inc. v. AT&T Co.*, 700 F.2d 785, 815 (2d Cir.1983) (AT&T's predatory practices in relation to rivals in the equipment manufacturing market gave rise to antitrust liability), *cert. denied*, 464 U.S. 1073 (1984). Eventually, these efforts led to the Modified Final Judgment ("MFJ") entered in *United States v. AT&T Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd*, 460 U.S. 1001 (1983). The MFJ separated the sale of telephone equipment and long distance services from local telephone services and gave the monopoly control over the vast local telephone network to what were then seven Regional Bell Operating Companies ("RBOCs").

Until 1996, "[s]tates typically granted [each RBOC] an exclusive franchise in each local service area." *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 371 (1999). In 1996, Congress enacted the Telecommunications Act of 1996 ("the Act" or "the Telecommunications Act"),[1] which provided new entrants an opportunity to compete in the long-monopolized market for local telephone service. In so doing, the Act made clear that the antitrust laws would continue to govern industry. *See* Pub. L. 104-104, Title VI, § 601(b)(1), 110 Stat. 56, 143 ("[N]othing in the Act or in the amendments made by this Act shall be construed to modify, impair or supercede the applicability of any antitrust laws."); *see also* H.R. CONF. REP. NO. 104-458, at 201 (1996) (explaining that this clause "prevents affected parties from asserting that the [Act] impliedly preempts other laws").

In opening the local telephone market to competition, Congress both preempted legal barriers to entry, such as exclusive franchises for local service areas, and imposed certain obligations on incumbent local exchange carriers (or "ILECs," as they are often called).[2] These obligations envisioned three alternative paths for entry: (1) wholly facilities-based providers that would "interconnect" their networks with the incumbent's network; (2) partially facilities-based providers that would, to supplement their own facilities, rent "unbundled network elements" from the ILEC, such as the line to a subscriber's home from the central office (or the "local loop," as it is called); or (3) resellers, which would provide the same service offered by the ILEC to their customers by buying the service at wholesale and selling it at retail. Regardless of the mode of entry used, firms taking advantage of the opportunity

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[1] Act of Feb. 8, 1996, Pub. L. 104-104, Title VI, 110 Stat. 56.

[2] An ILEC is defined in Section 251(h)(1) of the Telecommunications Act, 47 U.S.C. § 251(h)(1).

afforded by the Telecommunications Act are known as competitive local exchange carriers, or "CLECs."

This case involves the actions of Verizon Communications Inc. (through its predecessor Bell Atlantic, the defendant and appellee below) ("Verizon"), which continues to enjoy a monopoly in local telephone service. As alleged in the complaint, Verizon engaged in a course of conduct in the wake of the Telecommunications Act that was designed to exclude CLECs from the local telephone market. In general, the complaint focused on Verizon's refusal to provide equal access to its network, including (1) allowing customers to switch from its network to a CLEC's without losing service for long periods of time; and (2) enabling customers of a CLEC to call subscribers on Verizon's network without a degradation of service quality. In addition, as the complaint explained, Verizon "delayed filling orders of CLECs' customers, but not those of its own customers, or failed to fill orders for CLECs' customers at all." *Law Offices of Curtis V. Trinko, LLP v. Bell Atlantic Corp.* 309 F. 3d 71, 73 (2d Cir. 2002) (Sack, J., concurring in part and dissenting in part), App. at 43a. Similarly, the complaint alleged that Verizon had refused to provide competitors with access to essential facilities, such as "the local loop," on a reasonable basis. Finally, the complaint alleged that these anticompetitive practices did not result from any "valid business reason and [were] intended to exclude competition from the market." *Law Offices of Curtis V. Trinko, LLP v. Bell Atlantic Corp.*, 305 F.3d 89, 95 (2d Cir. 2002), App. at 6a-7a.

Law Offices of Curtis V. Trinko, LLP ("Trinko"), which sought to benefit from the opportunity to select a competitor of Verizon's for local telephone service, brought this action on its own behalf and on behalf of the class of similarly situated consumers in order to remedy the injuries they suffered from Verizon's anticompetitive course of conduct. In particular, Trinko alleged in its complaint that it endured degraded

telephone service as a direct result of Verizon's predatory practices towards its competitors in the local telephone market. *See Trinko*, 305 F.3d at 95, App. at 6a-7a. By raising the costs and degrading the quality of, or denying, telephone service provided by CLECs, Verizon encouraged customers to switch back to it for service or, in many cases, not to move to a CLEC at all. *See id.* at 106, App. at 27a.

In its decision below, the Court of Appeals for the Second Circuit decided that Trinko's claims for relief under Section 2 of the Sherman Act and Section 202(a) of the Communications Act withstood Verizon's motion to dismiss for failure to state a claim. *See Trinko*, 305 F.3d 89, App at 1a. In so doing, the Second Circuit agreed with the Seventh Circuit's decision in *Goldwasser v. Ameritech Corp.*, 222 F.3d 390 (7th Cir. 2000), which held that merely pleading a violation of the Telecommunications Act does not state a claim for relief under the Sherman Act. *See Trinko,* 305 F.3d at 109-10, App. at 31a-34a. Moreover, the Second Circuit also stressed that the allegations pled in the instant case are not immunized from antitrust review by regulation, but rather represent just the type of conduct that antitrust courts have judged previously to fall within the scrutiny of the Sherman Act. *See id.* at 109, App. at 32a (citing *Northeastern Tel. Co. v. AT&T Co.*, 651 F.2d 76, 82-83 (2d Cir. 1981)). In the wake of the Second Circuit's decision, the Eleventh Circuit also ruled, in accordance with the views offered by the United States and the Federal Communications Commission ("FCC"), that an antitrust action can challenge predatory conduct taken by an ILEC as long as the complaint specifies a basis for antitrust liability other than a mere violation of the Telecommunication Act. *See Covad Communications Co. v. BellSouth Corp.*, 299 F.3d 1272, 1282 n.8 (11th Cir. 2002), *pet. for rehearing pending*.

REASONS FOR DENYING THE WRIT

To avoid facing discovery and judicial scrutiny of its challenged practices regarding how it excluded rivals from the local telephone market, Verizon has offered a series of creative legal arguments touching on four distinct questions of antitrust law. In essence, Verizon seeks to obscure that the Second Circuit's decision in this case does not conflict with the Seventh Circuit's decision in *Goldwasser* and that this case constitutes a routine antitrust action to remedy misconduct that injured consumers. Moreover, because the Petition does not challenge any ruling on the basis of a developed factual record, it does not present this Court with an appropriate opportunity to evaluate whether any special antitrust rules are appropriate in the context of the local telecommunications market. Finally, Verizon's challenge to the Second Circuit's standing rulings raise no issue worthy of this Court's attention.

I. THE SECOND CIRCUIT'S DECISION DOES NOT RAISE A CIRCUIT CONFLICT AND FOLLOWS WELL ESTABLISHED PRINCIPLES OF ANTITRUST LAW

The Second Circuit's decision below does not raise a conflict with the Seventh Circuit's decision in *Goldwasser v. Ameritech Corp.*, 222 F.3d 390 (7th Cir. 2000). In *Goldwasser*, the Seventh Circuit held that if an antitrust plaintiff merely complains of violations of the Telecommunications Act, the case should be dismissed for failure to plead an actionable antitrust claim. *See* 222 F.3d at 400-01. In this case, the Second Circuit considered a different set of factual allegations – i.e., ones that did not simply rely on violations of the Telecommunications Act – and held that a plaintiff who pled facts sufficient to defeat a motion to dismiss under traditional antitrust principles should not be denied an opportunity to proceed simply because some of the conduct at

issue also related to requirements imposed by the Telecommunications Act. *See Trinko*, 305 F.3d at 109, App. at 31a. In short, nothing in the Second Circuit's opinion in this case suggests that it would have treated the complaint in *Goldwasser* any differently than the Seventh Circuit did, and nothing in *Goldwasser* suggests that the Seventh Circuit would have dismissed the complaint in this case as facially inadequate.

A. The Decision Below Is Consistent With *Goldwasser*'s Holding That A Failure To Comply With The Telecommunications Act Is Not Itself An Antitrust Violation

In *Goldwasser*, the Seventh Circuit evaluated an antitrust complaint that "focuse[d] tightly" on the violation of the market opening requirements imposed on incumbent local telephone providers by the Telecommunications Act. 222 F.3d at 394-95. In particular, the plaintiffs in *Goldwasser* maintained that "Ameritech's alleged failure to comply with the 1996 Act [was], in itself, also an antitrust violation." *Id.* at 396. In rejecting that argument, the Seventh Circuit concluded that it was "both illogical and undesirable to equate a failure to comply with the 1996 Act with a failure to comply with the antitrust laws." *Id.* at 400. In so doing, the Seventh Circuit explained that plaintiffs must state clearly how anticompetitive actions taken by an incumbent local telephone provider violated the antitrust laws in order to state a claim for antitrust relief. Significantly, the Seventh Circuit made clear that the Telecommunications Act did not impliedly repeal the antitrust laws, underscoring that the Telecommunications Act itself contained a savings clause that preserved antitrust oversight over the telecommunications industry. *See id.* at 401 ("Our principal holding is thus not that the 1996 Act confers implied immunity on behavior that would otherwise violate the antitrust law.").

To read *Goldwasser* as establishing what amounts in substance to a rule of antitrust immunity overlooks not only its insistence to the contrary, but suggests that *Goldwasser* overruled, *sub silencio*, the Seventh Circuit's earlier decision in *MCI Communications Corp. v. AT&T Co.*, 708 F.2d 1081 (7th Cir. 1982), *cert. denied*, 464 U.S. 891 (1983). In *MCI*, the Seventh Circuit concluded that AT&T had violated the antitrust laws by failing to cooperate with MCI on reasonable terms for "handing off" the telephone calls from its local lines to MCI's long distance lines. *Id.* at 1150-51. This conclusion acknowledged that the Communications Act of 1934 authorized the FCC to regulate the terms and conditions of "interconnection," which was at the heart of MCI's antitrust case against AT&T. *See* 47 U.S.C. § 201(a). In particular, the Seventh Circuit rejected AT&T's argument that the FCC's regulatory authority in this area displaced the need for antitrust oversight. *See MCI*, 708 F.2d at 1102-03. In so doing, it noted that the great weight of authority supported its conclusion that antitrust law should work in tandem with – and not be displaced by – a procompetitive regulatory regime. *Id.* at 1103 (citing, among other sources, *Otter Tail Power Co. v. United States*, 410 U.S. 366, 374 (1973)). Indeed, the fact that Verizon goes to great lengths to distinguish *MCI* only underscores the significance and relevance of that case. *See* Pet. at 16-18 and 12 n.6.[3]

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[3] To distinguish *MCI*, Verizon offers a number of erroneous arguments. First, Verizon maintains that in *MCI* the challenged conduct related to assistance provided "voluntarily" by AT&T. *Id.* at 16. Second, Verizon suggests that the nature of the cooperation provided by AT&T differs substantially from the type of cooperation involved in the instant case. *Id.* at 17-18. As to AT&T's conduct with respect to interconnection, not only had the FCC undertaken a number of regulatory initiatives in this regard that governed AT&T's behavior, but AT&T argued that the FCC's authority and oversight barred antitrust liability. *See* 708 F.2d at 1102-03, 1131-37. As to the type of cooperation, this case involves very similar issues to *MCI* in that it also involves issues related to the "interconnection" of rival networks.

In a recent brief to the Eleventh Circuit as *amicus curiae*, the United States and the Federal Communications Commission emphasized the point that the only viable and sensible interpretation of *Goldwasser* is that it held that plaintiffs who challenge actions by incumbent local exchange carriers must allege more than violations of the Telecommunications Act to state a claim for relief under the Sherman Act. First, they explained that the Telecommunications Act contains two "savings clauses" that make clear that the Act's regulatory regime does not displace antitrust law. *See* Brief For the United States and Federal Communications Commission as Amici Curiae, *Covad Communications Co. et al. v. BellSouth Corp. et al.*, at 13 (December 17, 2001), *available at* http://www.usdoj.gov/atr/cases/f9700/9708.pdf (hereafter "U.S. Brief") (citing Pub. L. No. 104-104, Title VI, § 601(c)(1), 110 Stat. 56, 143 (general savings clause) and Pub. L. No. 104-104, Title VI, § 601(b)(1), 110 Stat. 56, 143 (antitrust savings clause)).

Second, they emphasized that both the Act's legislative history and its implementing regulations acknowledge the role for antitrust oversight. *See id.* at 14-15 (citing, among other sources, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 61 Fed. Reg. 45476, 45494 (1996) ("nothing in . . . our implementing regulations is intended to limit the ability of persons to seek relief under the antitrust laws")); *see also* S. REP. NO. 104-23, at 17 (1995) (Senate Bill explanation that "the provisions of this bill shall not be construed to grant immunity from any future antitrust action against any entity referred to in the bill.").[4] Finally, they

[4] The applicability of the antitrust laws was also a theme in President Clinton's signing statement:

> The [Telecommunication] Act's emphasis on competition is also reflected in its antitrust savings clause. This clause ensures that even for activities allowed under or required by the legislation, or activities resulting from FCC rule-making or orders, the antitrust laws continue to apply fully.

Statement by President William J. Clinton upon Signing S. 652, 32 Weekly Comp. Pres. Doc. 218 (February 8, 1996), *reprinted in* 1996 U.S.C.C.A.N. 228-1, 228-3.

underscored that there is no conflict between the two statutory regimes that would give rise to an implied immunity defense. *See id.* 21-22.[5]

Rather than focus on *Goldwasser*'s holding, Verizon seizes on ambiguous dicta to support its claim of a circuit conflict. In particular, Verizon focuses on *Goldwasser*'s suggestion that "[t]he antitrust laws would add nothing to the oversight already available under the 1996 law," 222 F.3d at 401, downplaying *Goldwasser*'s explicit acknowledgment immediately after that statement that the Telecommunications Act does not supplant antitrust oversight, *see id.* at 401. Whatever this dicta may mean,[6] it provides no warrant to review this

[5] The government's brief to the Eleventh Circuit in an earlier case also noted how, in the context of asking for regulatory permission to enter new markets, Bell Companies have explained that the possibility of antitrust liability constitutes a formidable deterrent against anticompetitive conduct. *See* Brief For the United States and Federal Communications Commission As Amicus Curiae In Support of Appellants, *Intermedia Communications, Inc. v. BellSouth Telecommunications, Inc.*, at 12-13 (March 28, 2001) (available at http://www.usdoj.gov/atr/cases/f7700/ 7777.pdf).

[6] Perhaps the best reading of the dicta seized on by Verizon is that courts hearing antitrust claims in the telecommunications context should take the Act's regulatory machinery into account in crafting appropriate relief. *See* U.S. Brief at 18-19 (suggesting this interpretation). Alternatively, the sentiment singled out by Verizon may simply be "misleading dicta" that has enabled the defenders of the incumbent providers to press for a much broader shield against antitrust liability than that contemplated by the *Goldwasser* court. *Cf. Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't of Health and Human Resources*, 532 U.S. 598, 621 (2001) (noting unintended effect of "misleading dicta").

case. In particular, the Second Circuit properly distinguished *Goldwasser*, explaining that "the claim [in *Goldwasser*] was merely an allegation that the Telecommunications Act was violated and not a freestanding antitrust action." *Trinko*, 305 F.3d at 109, App. at 31a; *see also Covad Communications*, 299 F.3d at 1282 n.8 (rejecting broad reading of dicta in *Goldwasser* and noting *Goldwasser* "tied its conclusion to the specific allegations of the complaint in that case"). Thus, unless another Court of Appeals adopts the expansive reading of *Goldwasser* advanced by Verizon here – i.e., that all antitrust actions are displaced if they relate to the Telecommunications Act's requirements – there is no conflict that warrants the attention of this Court.

B. Antitrust Law Provides A Right Of Action Against A Monopolist Who Deals With Competitors In A Predatory Fashion

On Petitioner's version of *Goldwasser*'s holding, antitrust law does not impose any affirmative obligations on monopolists' dealings with competitors. This misstates the law. As this Court has repeatedly made clear, there are circumstances where a monopolist's refusal to deal with a rival on reasonably practicable terms violates Section 2 of the Sherman Act. *See Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 483 n.32 (1992); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601 (1985); *see also* U.S. Brief at 9 ("[U]nder well established antitrust doctrine, a monopolist's refusal to deal with a rival without a legitimate business justification may, in certain circumstances, violate Section 2 of the Sherman Act."). In particular, as the Seventh Circuit explained in an earlier case, a monopolist violates the antitrust laws where it "refuses to cooperate with a competitor in circumstances where some cooperation is indispensable to effective competition." *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 797 F.2d 370, 379 (7th Cir. 1986) (Posner, J.), *cert. denied*, 480 U.S. 934 (1987). Or, as this Court put it, if "valid business reasons" do not justify conduct that tends to impair the opportunities of a monopolist's rivals, that conduct can be condemned as exclusionary and violative of Section 2. *See Eastman Kodak*, 504 U.S. at 483; *Aspen*, 472 U.S. at 605; *see also Trinko*, 305 F.3d at 107-08, App. at 28a-31a (same).

Before the breakup of the Bell System, there were a series of antitrust cases that focused on the anticompetitive actions by AT&T towards would-be competitors, particularly in the long distance and equipment manufacturing markets. For both rival long distance firms (like MCI) and equipment manufacturers (like Litton), AT&T's control over access to local telephone lines enabled it to impede entry by refusing to provide reasonable interconnection arrangements to alternative telephone equipment manufacturers or rival long distance networks. *See, e.g., MCI*, 708 F.2d at 1150-51 (holding AT&T liable for predatory conduct in long distance market); *Litton Systems, Inc.*, 700 F.2d at 814-15 (holding AT&T liable for predatory conduct in telephone equipment market). –AT&T's series of anticompetitive maneuvers led to a spate of antitrust suits (including one by the United States), which ultimately yielded important pro-competitive results. *See United States v. AT&T Co.*, 552 F. Supp. 131 (D.D.C. 1982) (entering consent decree to break up Bell System as of January 1, 1984), *aff'd*, 460 U.S. 1001 (1984); Roger Noll & Bruce Owen, *The Anticompetitive Uses of Regulation: United States v. AT&T*, in THE ANTITRUST REVOLUTION 290 (J.E. Kwoka & Lawrence J. White eds., 1989). In practice, these antitrust actions worked in tandem with the existing regulatory regime to advance the goals of "other regulatory efforts that attempted to create interconnection rights for non-Bell long-distance carriers." James B. Speta, *A Common Carrier Approach To Internet Interconnection*, 54 FED. COMM. L.J. 225, 266 (2002).

Before the Telecommunications Act, many states legally prevented potential entrants from competing to provide local telephone service. The Act, in addition to preempting legal barriers to entry (47 U.S.C. § 253), required the ILECs to, among other things, interconnect with rival networks and lease access to elements of the network (such as the local loop). *See* 47 U.S.C. § 251. In so doing, the Telecommunications Act, at least from an antitrust perspective, changed the facts of "market life." *MCI*, 708 F.3d at 1105; *see also United States v. Marine Bancorporation*, 418 U.S. 602, 627 (1974) (antitrust analysis of bank mergers "must take into account the unique federal and state" regulation). Consequently, the drafters of the Telecommunications Act self-consciously created conditions that would give rise to antitrust claims – just as had occurred once regulation and technology facilitated entry into the previously monopolized long distance and equipment manufacturing markets. *See* Pub. L. No. 104-104, Title VI, § 601(b)(1), 110 Stat. 56, 143 ("nothing in this Act . . . shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws.").[7]

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[7] As Senator Thurmond underscored during the Senate debate:

> Today we take for granted that the antitrust laws apply to the communications sector. During the Antitrust Division's antitrust case in the 1970s against the Bell system, however, some argued that the existence of FCC regulations displaced the antitrust laws and made them inapplicable. The courts emphatically rejected that challenge then, and the antitrust savings clause in the bill today makes clear that that question cannot be reopened. A strong, competitive communications sector is essential to continued American prosperity in the next century. Application of the antitrust laws is the most reliable, time-tested means of ensuring that competition, and the innovation it fosters, can flourish to benefit consumers and the economy.

142 CONG. REC. S711 (daily ed. Feb. 1, 1996) (statement of Sen. Thurmond).

Under ordinary antitrust principles, the possibility that Verizon violated the Telecommunications Act does not shield it from antitrust scrutiny based on the same conduct. Similarly, for example, simply because a case implicates claims addressable under state tort law, a plaintiff is not barred from seeking antitrust remedies. *See, e.g., Conwood Co., L.P. v. U.S. Tobacco Co.*, 290 F.3d 768, 783-84 (6th Cir. 2002). Consequently, the Second Circuit's decision below followed well-established antitrust principles in concluding that "the fact that [an antitrust complaint] resembles an action brought under another statute in itself is unproblematic." 305 F.3d at 109, App. at 32a.

C. This Case Presents An Inappropriate Context To Examine The Issue Of How Antitrust Law Relates to Telecommunications Regulation

The precise nature and scope of antitrust liability arising from a local telephone monopolist's predatory conduct should be defined based on an actual holding of liability and a developed record. To enlist the interest of this Court, Verizon maintains that the Second Circuit's decision "extends [Section 2] duties beyond any previous holding of liability." Pet. at 16. This suggestion, however, rests on a misrepresentation of the relevant facts and legal backdrop.

The contours of Section 2 liability, as this Court made clear in *Aspen*, focus on the elements of "exclusionary" conduct and the presence (or lack thereof) of a "legitimate business justification." *See Aspen*, 472 U.S. at 604-05. In this case, the Second Circuit followed *Aspen*, leaving for factual development the questions of whether Verizon's conduct was anticompetitive and/or justified by a legitimate business purpose. *See Trinko*, 305 F.3d at 107-09, App. at 28a-31a. This approach, contrary to Verizon's suggestion, neither

invented a new antitrust theory nor actually assigned liability to Verizon. Rather, it allowed the case to move forward towards discovery and the summary judgment stage. *See id.* at 108, App. at 31a.

To the extent that the Telecommunications Act's regulatory regime is relevant to antitrust cases such as this one, it is in evaluating the legitimacy of a business justification for an exclusionary practice. In the litigation against AT&T, for example, the Seventh Circuit concluded that "[i]n the particular context of an industry subject to extensive and rapidly changing regulatory demands, we believe that an antitrust defendant is entitled both to raise and to have the jury consider its good faith adherence to regulatory obligations as a legitimate antitrust defense." *MCI*, 708 F.2d at 1109-10; *see also City of Chanute, Kan. v. Williams Natural Gas Co.*, 955 F.2d 641, 653 (10th Cir. 1992) (pipeline company's denial of access to other gas suppliers backed by legitimate business purpose in light of regulatory history in natural gas industry), *cert. denied*, 506 U.S. 831 (1992). Similarly, as a question of fact in this case, Verizon could argue, for example, that its practices related to how customers are treated when they switch to an alternative carrier are justified by state or federal regulation (e.g., because regulators required the procedure at issue).

The relevance of regulation in assessing the legitimacy of a challenged practice (as a "fact of market life," *MCI*, 708 F.2d at 1105) can be judged only on a complete factual record. In the antitrust case brought by *Litton*, for example, the Second Circuit rejected, after a trial, that regulation fully addressed the possibility of anticompetitive conduct and condoned the challenged practice. *See Litton*, 700 F.2d at 811-12. By contrast, in *Town of Concord v. Boston Edison Co.*, also after a full trial, the First Circuit concluded that there existed powerful reasons to conclude that no competitive harm escaped the attention of regulators in the very unique circumstances of that case. 915

F.2d 17, 26-28 (1st Cir. 1990), *cert. denied*, 499 U.S. 931 (1991).[8] Significantly, both *Litton* and *Town of Concord* emphasize that antitrust scrutiny should generally complement regulation and not bar antitrust claims related to regulated conduct; rather, courts should evaluate the nature of regulation – and its effectiveness – in judging the merits of an antitrust claim on a complete record. *See United States v. Western Electric Co.*, 900 F.2d 283, 298 (D.C. Cir. 1990) (simply assuming effectiveness of regulation would be "an abdication of judicial responsibility"). As the Second Circuit correctly recognized in this case, where there has been no factual development on the impact of regulation or its effectiveness, it would be inappropriate to rule out the possibility of antitrust liability. *See Trinko*, 305 F.3d at 112 n.17, App. at 37a.

II. THE SECOND CIRCUIT'S TREATMENT ON THE ESSENTIAL FACILITIES AND THE MONOPOLY LEVERAGING CLAIMS ARE NOT APPROPRIATE FOR REVIEW

Verizon's petition suggests that this Court should review the Second Circuit's treatment of the essential facilities doctrine and monopoly leveraging theory. Even if these issues were worthy of this Court's attention, this case would present an especially inappropriate one to examine the relevant issues.

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[8] *Town of Concord* involved the unique scenario of a "price squeeze" allegation where an antitrust court would necessarily have to second guess the price setting decisions made by a regulatory body. This circumstance, as the Second Circuit recognized, differs greatly from the allegations in the instant case relating to equal access to networks and an incumbent's base of customers. *See Trinko*, 305 F.3d at 112 n.17, App. at 37a.

A. This Case Provides An Inappropriate Vehicle To Review The Monopoly Leveraging Theory

Regardless of the status of the monopoly leveraging theory in the lower courts, this is an inopportune case to consider the nature of this doctrine. Significantly, this case arises in a regulated industry, which presents a context that heightens the concern about leveraging monopoly power from one market into another to gain an unfair competitive advantage. In particular, even those critical of monopoly leveraging arguments in other contexts acknowledge that "monopoly leveraging has rightly been a concern where natural monopoly prevails, principally because the monopolists have been rate-regulated." James B. Speta, *Tying, Essential Facilities, and Network Externalities: A Comment on Piraino*, 93 NW. U. L. REV. 1277, 1280 (1999).[9]

In addition to the uniqueness of leveraging claims raised in the context of regulated industries, there are three additional reasons that this case presents a poor vehicle for the Court to examine the monopoly leveraging issue. First, this case raises a number of antitrust theories, so consideration of the monopoly leveraging theory would constitute a review of the lower court's *opinion*, not its *judgment* that the complaint states a

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[9] In her opinion in *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, Justice O'Connor explained, in the context of a tying case, the logic behind why a regulated industry presents a scenerio where leveraging claims would be particularly compelling:

> In a regulated industry a firm with market power may be unable to extract a [monopoly] profit because it lacks control over the prices it charges for regulated products or services. Tying may then be used to extract that profit from sale of the unregulated, tied products or services.

466 U.S. 2, 36 n.4 (1984) (O'Connor, J, joined by Powell, J. and Rehnquist, C.J., concurring in result) (citation omitted).

viable claim for relief under Section 2 of the Sherman Act. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984) (the Court "reviews judgments, not opinions") (footnote omitted). Second, this case is still at an initial stage, so the Court would not have the benefit of a complete record that could provide critically important perspective on the merits and role of a monopoly leveraging theory apart from that afforded by other antitrust theories. Finally, it behooves the Court to wait until an actual case assigns antitrust liability based on a leveraging theory alone (as opposed to other available theories) so that it can better judge whether this theory should be endorsed as a distinct basis for liability.

B. The Essential Facilities Claim Is Inappropriate For Review

Verizon emphasizes that "[t]his Court has never recognized the essential facilities doctrine," (Pet. at 16), but fails to mention that every federal circuit has done so. *See, e.g., Hecht v. Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978); *Interface Group, Inc. v. Massachusetts Port Authority*, 816 F.2d 9, 12 (1st Cir. 1987); *Delaware & Hudson Ry. Co. v. Consol. Rail Corp.*, 902 F.2d 174, 179 (2d Cir. 1990), *cert. denied*, 500 U.S. 928 (1991); *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 748 (3d Cir. 1996); *Advanced Health-Care Servs. v. Radford Community Hosp.*, 910 F.2d 139, 150 (4th Cir. 1990); *Mid-Texas Comm. Sys. Inc. v. AT&T Co.*, 615 F.2d 1372, 1387 n.12 (5th Cir. 1980); *Directory Sales Mgt. Corp. v. Ohio Bell Tel. Co.*, 833 F.2d 606, 612 (6th Cir. 1987); *MCI*, 708 F.2d at 1132-33; *City of Malden v. Union Elec. Co.*, 887 F.2d 157, 160 (8th Cir. 1989); *Vernon v. Southern California Edison Co.*, 955 F.2d 1361, 1366-67 (9th Cir. 1992); *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1520 (10th Cir. 1984), *aff'd on other grounds*, 472 U.S. 585 (1985); *Covad Communi-*

cations, 299 F.3d at 1285-88; *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1356-57 (Fed. Cir. 1999).

Despite Verizon's focus on a selective sampling of the academic commentary, there is strong support for the view that this Court's cases – as suggested by the lower courts' decisions – provide for an essential facilities claim under Section 2 of the Sherman Act. In particular, the circuit courts and prominent antitrust authorities have regarded this Court's decision in *Otter Tail Power Co. v. United States* as contemplating the possibility that "a firm which controls a facility essential to its competitors may be guilty of monopolization if it refuses to allow them access to the facility." *Olympia*, 797 F.2d at 376 (Posner, J.) (citing *Otter Tail Power Co. v. United States*, 410 U.S. 366, 378-79 (1973)); *see also AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. at 388 (adverting to "essential facilities" doctrine, pressed on the Court by incumbent providers as appropriate standard for defining the "unbundling" requirements of local telephone providers). Significantly, even those commentators who are critical of the doctrine acknowledge that, at least in the context of a regulated industry where a regulatory authority can superintend the relief – as was the case in *Otter Tail*, for example – the doctrine is relatively unobjectionable. *See* Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841, 853 (1989) (essential facility doctrine may be practical "when, as in *Otter Tail*, a regulatory agency already exists to control the terms of dealing"). Thus, if this Court were to review this doctrine, it would make sense to do so in a context where no regulatory agency could superintend the relevant terms of dealing.

Verizon also paints a misleading and inaccurate picture when it suggests that the Second Circuit took an unprecedented step in contemplating the possibility of antitrust liability based on the provision of terms of access that were unjustifiably

degraded (as opposed to denied entirely). First, as a matter of the competitive effects of providing or denying access, it is quite clear that a sufficiently degraded form of access can be equivalent to providing no access at all. As the FCC has noted (and facts would explicate), in this field even minor delays in interconnecting "can represent a serious and damaging business impediment to competitive market entrants." Second Report and Order, *In re Implementation of the Telecommunications Act of 1996*, 13 F.C.C.R. 17,018, at ¶ 3 (1998). Second, and following this principle, a number of lower courts have concluded – as the Second Circuit contemplated – that the relevant standard for the essential facilities doctrine is whether the monopolist allowed access "on reasonable terms, equivalent to a denial of access." *City of Chanute*, 955 F.2d at 648 (citing *United States v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912)); *see also Delaware & Hudson Ry. Co.*, 902 F.2d at 179-80 (essential facilities doctrine does not require an outright refusal, as a claim is stated when "the terms of the offer to deal are unreasonable"). This approach flows from the standard outlined in the *Terminal Railroad* case, which has provided a valuable guide to the lower courts in devising the contours of the doctrine: access to an essential facility should "'place every such company upon as nearly an equal plane as may be with respect to expenses and charges as that occupied by the proprietary companies.'" *City of Chanute*, 955 F. 2d at 648 (quoting *Terminal R.R.*, 224 U.S. at 411).

Finally, as noted above with respect to the monopoly leveraging issue, there are a series of reasons why, even if the Court were interested in reviewing the essential facilities issue, this case would be a poor vehicle for doing so. Indeed, the need for factual development to guide the Court's consideration of legal issues is particularly acute as to the essential facilities doctrine. Mindful of this point, the Second Circuit highlighted that questions like whether the local loop is an essential facility or whether interconnection arrangements

were reasonable are heavily fact-intensive and should thus be evaluated in the first instance by a finder of fact. *See Trinko*, 305 F.3d at 108, App. at 29a-30a. Consequently, this Court should decline to address such issues on the undeveloped record in the instant case.

III. THE STANDING RULINGS RAISE NO NOVEL ISSUES AND DO NOT MERIT THIS COURT'S REVIEW

The Second Circuit's conclusion that Trinko has standing to assert its claims under the Sherman Act and Communications Act is consistent with this Court's precedents. As the Second Circuit's rulings do not conflict with this Court's – or indeed any other circuit court's – decisions, they do not merit review.

A. Trinko's Standing To Assert Sherman Act Violations Reflects The Application of Well Settled Legal Principles

In *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982), this Court clarified the Sherman Act's scope of protection for injured parties. *McCready* presented the question of whether subscribers of a group health plan, who were injured by an antitrust conspiracy aimed at psychologists (who would, in turn, provide care to the subscribers), had standing to litigate an antitrust action. This Court answered that question in unmistakably clear terms: "Here the remedy cannot reasonably be restricted to those competitors whom the conspirators hoped to eliminate from the market." *Id.* at 479. This conclusion followed naturally from the Sherman Act's "expansive remedial purpose" that intended to "provide ample compensation to the victims of antitrust violations." *Id.* at 472 (internal quotations and citations omitted).

In its decision below, the Second Circuit applied *McCready* to the facts of the instant case. As in *McCready*, the relevant antitrust violation by Verizon focused not on customers like Trinko, but on entrants into the market for local telephone service. In particular, customers of the new entrants, although not the immediate target of the antitrust violation, suffered in the same manner as the health plan subscribers in *McCready*, *id.* at 483, as they faced degraded service on account of Verizon's predatory practices. As the Second Circuit put it:

> As a result of an alleged monopoly scheme, the plaintiff in this case had a similar set of choices [to the plaintiff in *McCready*]: (1) stay with AT&T and receive inferior local service; or (2) switch to Bell Atlantic. While the second choice would hurt AT&T as a competitor, the first choice directly injures the plaintiff as a consumer. In this case, the plaintiff made the first choice and suffered the requisite antitrust injury.

Trinko, 305 F.3d at 106, App. at 27a.

Verizon attempts to portray this case as something other than a routine application of *McCready* by claiming that the injury in that case was "direct" because the "defendant refused to pay her." Pet. at 24-25. This ground for distinguishing *McCready* is unconvincing. In *Associated General Contractors v. California State Council of Carpenters*, an antitrust standing case in the wake of *McCready*, this Court expressly declined to impose any such requirement and instead concluded that the issue of standing rests on a fact-specific judgment. *See* 459 U.S. 519, 536-37 (1983). In particular, this Court explained that a direct injury results when the harm from the violation falls within a multi-factor, fact-specific test, even if the injured party did not deal directly with the antitrust

defendant or was not the immediate victim of the violation. *See id.* at 540-41.

B. The Question of Standing Under The Communications Act Does Not Merit The Attention of This Court

The Second Circuit concluded in its decision below that because the Communications Act is "broadly written," any person injured by a violation of the Act has a right of action under the Act to recover for damages. *See Trinko*, 305 F.3d at 98, App. at 11a-12a. Notably, Verizon again fails to offer any cases that hold to the contrary.

To challenge the Second Circuit's conclusion, Verizon claims that Trinko's injury is not sufficiently "direct." There is nothing about Trinko's injury, however, that is "wholly derivative" of the injuries suffered by the competitive provider who offered Trinko telephone service. That is, Trinko – and similarly situated customers of competitive providers – suffer a discrete and direct injury on account of predatory practices that degrade their service above and beyond the injury suffered by the CLEC whose business suffers from those predatory practices. As the Second Circuit put it in rejecting Verizon's standing argument, "'the harm that these customers are alleging – damages resulting from poorer service than they would otherwise have received had Bell Atlantic acted lawfully – is wholly distinct from the harm suffered by the competitors.'" *Trinko*, 305 F.3d at 100, App. at 15a (quoting *Law Offices of Curtis V. Trinko v. Bell Atlantic Corp.*, 123 F. Supp. 2d 738, 741 (S.D.N.Y. 2000), App. at 53a-54a).

In short, the issue of standing under the Communications Act is not one that this Court should consider at this time. At present, there is precious little authority on this topic and, in the wake of the Telecommunications Act, the lower courts may

finally have occasion to interpret the breadth of the Communications Act's ambit of protection. Moreover, even to the extent that courts could conceivably determine that consumers like Trinko bring claims that are wholly derivative, that judgment is one that should be made on a fuller factual basis than available from only a complaint. Indeed, as for the pleadings in the instant case, the allegation of degraded or denied telephone service suffices as a basis to proceed towards summary judgment. Invoking this line of reasoning, the Second Circuit concluded that "[w]hile the district court may find otherwise after discovery and a motion for summary judgment, it is too early to conclude on this record that the plaintiff only suffered a wholly derivative injury." 305 F.3d at 100, App. at 15a-16a (footnote omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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December 13, 2002